Supreme Court, U.S.
FILED
OCT 21 1996
CLERK

No. 96-456

In The

Supreme Court of the United States

October Term, 1996

JAMES B. HEALY,

Petitioner,

v.

FAIRLEIGH DICKINSON UNIVERSITY, FRANCIS J. MERTZ, NANCY S. BARRETT, MORDECHAI ROZANSKI,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

APRUZZESE, MCDERMOTT, MASTRO & MURPHY, P.C.
FRANCIS A. MASTRO, Esq.
P.O. Box 112
25 Independence Boulevard
Liberty Corner, New Jersey 07938
(908) 580-1776
Counsel for Respondents

On The Brief:
MAURICE J. NELLIGAN, JR., Esq.
KIMBERLY E. ROBERTSON, Esq.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE DENIED .. 3

1. Only The Judgment Of The Highest State Court Which Has Reviewed The Matter May Be Reviewed By This Court 4

2. The State Court Proceedings Are Not Final... 4

3. The New Jersey Superior Court, Appellate Division Did Not Decide Any Issues Relative To The Individual Respondents 5

4. The First Question Presented Fails To Raise A Federal Question..... 5

5. The Second Question Presented Fails To Raise A Federal Question 7

6. The Second Question Presented Raises An Issue That Was Not Raised In The Decision Or Record Below..... 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES CITED

Adam v. Saenger, 303 U.S. 59 (1938) 4

Bowe v. Scott, 233 U.S. 658 (1914) 6

Cardinale v. Louisiana, 394 U.S. 437 (1969) 5, 9

Eiseman v. California, 273 U.S. 663 (1927) 6

Harding v. Illinois, 196 U.S. 78 (1904) 6

Herndon v. Georgia, 295 U.S. 441 (1935), *rehearing denied*, 296 U.S. 661 (1935) 6

Howlett v. Rose, 496 U.S. 356 (1990) 5, 9

In re Route 280 Contract, 89 N.J. 1 (1982) 8

Market Street Railroad Co. v. Railroad Comm'n, 324 U.S. 548 (1945), *rehearing denied*, 324 U.S. 890 (1945) 4, 5

Monroe v. Pape, 365 U.S. 167 (1961) 7, 8, 9

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) 7, 8, 9

New York Central & Hudson Railroad Co. v. City of New York, 186 U.S. 269 (1902) 6

O'Dell v. Espinoza, 456 U.S. 430 (1982) 4

Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952) 7

Shelley v. Kraemer, 334 U.S. 1 (1948) 7, 8, 9

Sullivan v. Texas, 207 U.S. 416 (1908) 4

Swanson v. Sarja, 263 U.S. 685 (1924) 6

TABLE OF AUTHORITIES – Continued

Page

Tacon v. Arizona, 410 U.S. 351 (1973) 5, 9

Terminal Construction Corp. v. Atlantic City Sewerage Authority, 67 N.J. 403 (1975) 8

CONSTITUTIONAL AMENDMENTS CITED

U.S. Const. Amend. I 8, 9

U.S. Const. Amend. XIV 7, 8, 9

STATUTE CITED

28 U.S.C. § 1257 (West 1993: Supp. 1996).....1, 3, 4, 7

RULES CITED

N.J. Ct. R. 2:12-4 (Gann 1996)..... 8

Sup. Ct. R. 14(1)(g)(i), 28 U.S.C. (West 1984 & Supp. 1996) 6, 9

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Fairleigh Dickinson University, Francis J. Mertz, Nancy S. Barrett, and Mordechai Rozanski, respectfully request that this Court deny the petition for writ of certiorari, seeking review of three state court decisions.

OPINIONS BELOW

The New Jersey Supreme Court declined to review this matter, denying petitioner's request for certification. The court's order is reported at 145 N.J. 372, 678 A.2d 712 (1996). The Appellate Division reviewed and affirmed the decision made by the trial court. That decision is reported at 287 N.J. Super. 407, 671 A.2d 182 (App. Div. 1996). The decision of the New Jersey Superior Court, Law Division is reproduced at pages 16-22 of the appendix in the petition.

JURISDICTION

The petition claims to invoke 28 U.S.C. § 1257 as the basis of this Court's jurisdiction to review the determinations of the state tribunals. Respondents contend that the petition fails to establish the jurisdictional predicates of Section 1257, and thus certiorari should be denied. The jurisdictional deficiencies of the petition are addressed in the Reasons the Petition Should Be Denied portion of this Brief.

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the facts inaccurately recites the holdings of the trial court and the Appellate Division. Contrary to petitioner's version of the facts, there is simply no federal question involved in these proceedings and the issues decided below were solely ones of state law. Accordingly, respondents set forth the following counterstatement of the facts considered in the state-court proceedings.

On appeal, the Appellate Division of the New Jersey Superior Court affirmed the trial court's dismissal of the underlying complaint filed by petitioner. In the complaint, petitioner contended that the respondent university could not terminate his employment as a senior administrator because he had acquired tenure *de facto*. Essentially, petitioner argued that he was exempt from the rigorous tenure prerequisites found in the University's Faculty Handbook, including a doctorate which he did not possess, simply because he had been a faculty member for fourteen continuous academic semesters. Petitioner based his position upon a narrow reading of a single clause, taken out of context and unrelated to the obtainment of tenure, found in the Faculty Handbook.

The trial court found that there was a factual issue as to how many semesters petitioner had been a member of the faculty and thus put this question to the jury. Assuming that the jury found that petitioner had served the requisite semesters as a faculty member, the trial court, however, reserved for itself the legal question of contract interpretation, namely whether petitioner had acquired tenure *de facto*. Although the jury found that petitioner

had served on the faculty for fourteen continuous semesters, the trial court held that petitioner did not acquire tenure *de facto* under New Jersey contract law. Accordingly, the trial court entered an order in favor of respondents dismissing the complaint with prejudice.

On appeal, the Appellate Division concluded that the trial court had properly reserved to itself the legal question of whether petitioner had acquired tenure *de facto*. The Appellate Division specifically found that the jury was not asked to determine whether petitioner had acquired tenure, but only the number of academic semesters he had been a faculty member as opposed to a member of the administration. Further, the Appellate Division held that the trial court had properly applied and interpreted New Jersey contract law in arriving at the conclusion that petitioner did not acquire tenure *de facto*. The Appellate Division did not reach in detail petitioner's fleeting argument that the respondent university violated his Fourteenth Amendment rights because it found that respondent was a private university. Significantly, petitioner never offered and the record is devoid of any evidence to dispute respondents' private non-governmental status. Accordingly, the Appellate Division correctly affirmed the dismissal of the complaint.

REASONS WHY THE WRIT SHOULD BE DENIED

Respondents oppose the petition because it fails to satisfy the jurisdictional predicates of 28 U.S.C. § 1257 (West 1993 & Supp. 1996) in six respects.

1. Only The Judgment Of The Highest State Court Which Has Reviewed The Matter May Be Reviewed By This Court.

The petition improvidently seeks the review of the determinations made by the New Jersey Superior Court, Law Division, the New Jersey Superior Court, Appellate Division, and the New Jersey Supreme Court. However, this Court only has jurisdiction over the determination made by the highest state court which has reviewed the matter. *See, e.g., Sullivan v. Texas,* 207 U.S. 416, 420 (1908); *Adam v. Saenger,* 303 U.S. 59, 61 (1938). As the New Jersey Supreme Court denied certification, the highest state court to review this case was the New Jersey Superior Court, Appellate Division. Thus, this Court may only exercise jurisdiction over the decision of the Appellate Division, and the writ should properly have been addressed to that court. Nonetheless, as established in paragraphs 2-6, *infra,* such jurisdiction is lacking, and thus the petition should be denied.

2. The State Court Proceedings Are Not Final.

Respondents oppose the petition because there are proceedings still pending before the New Jersey Supreme Court. Under Section 1257, this Court has jurisdiction to review only final decisions of state courts. *See* 28 U.S.C. § 1257; *O'Dell v. Espinoza,* 456 U.S. 430 (1982); *Market Street Railroad Co. v. Railroad Comm'n,* 324 U.S. 548, 551 (1945), *rehearing denied,* 324 U.S. 890 (1945). However, petitioner's motions for reconsideration and remand for a due process order made before the New Jersey Supreme Court have not yet been decided and thus this case is still

subject to further review and correction in a state tribunal. Consequently, the judgment by the state court is not the proper subject of a petition for certiorari. *See Market Street Railroad Co.*, 324 U.S. at 551. Therefore, the pending proceedings before the New Jersey Supreme Court preclude this Court from reviewing the decision below. *See id.*

3. The New Jersey Superior Court, Appellate Division Did Not Decide Any Issues Relative To The Individual Respondents.

Respondents oppose the petition as it applies to the three individuals, Francis J. Mertz, Nancy S. Barrett, and Mordechai Rozanski. Petitioner did not appeal the trial court's decision dismissing the complaint against the individual respondents, and thus the Appellate Division never addressed the issues as applied to them. It is well-established that this Court does not have jurisdiction over any issue not presented and decided in the state court. *See Howlett v. Rose*, 496 U.S. 356, 370 n. 16 (1990); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). As a result, the petition is fatally defective as to the individual respondents, and thus should be denied.

4. The First Question Presented Fails To Raise A Federal Question.

Respondents oppose the petition because the First Question Presented is devoid of any specific federal issue sought to be reviewed by this Court. It is well-settled that mere reference or inference to a clause of the United

States Constitution is insufficient to confer jurisdiction upon this Court. *See Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935), *rehearing denied*, 296 U.S. 661 (1935); *Harding v. Illinois*, 196 U.S. 78, 88 (1904); *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914). Significantly, the First Question Presented does not make reference to any specific provision of the United States Constitution as required by Supreme Court precedent. *See New York Central & Hudson Railroad Co. v. City of New York*, 186 U.S. 269, 273 (1902); *Eiseman v. California*, 273 U.S. 663 (1927); *Swanson v. Sarja*, 263 U.S. 685 (1924). Nor does it comply with the dictates of Supreme Court Rule 14(1)(g)(i) as the petition fails to identify in what instance below the federal issue was raised or to provide "pertinent quotations of specific portions of the record" to establish that the federal question was timely or properly raised. SUP. CT. R. 14(1)(g)(i), 28 U.S.C. (West 1984 & Supp. 1996).

In fact, the issues raised in the First Question Presented were resolved by the New Jersey Superior Court, Appellate Division solely on independent state-law grounds. Applying New Jersey contract principles, the Appellate Division concluded that even if petitioner was considered a faculty member, he did not acquire tenure at the private university by virtue of his length of service. However, petitioner obstinately refuses to accept this sound interpretation of state law, instead asserting broad-based and nonspecific allegations of constitutional deprivations. Such sweeping contentions are patently insufficient to confer jurisdiction upon this Court.[1]

---

[1] Should this Court hold that the First Question Presented raises a federal question, the petition should nonetheless be

5. The Second Question Presented Fails To Raise A Federal Question.

Respondents oppose the petition because the portion of the Second Question Presented asserting violations of the Fourteenth Amendment does not involve novel or contentious issues of federal law. Under Section 1257, this Court has jurisdiction to review only those state court decisions involving a substantial federal question. *See* 28 U.S.C. § 1257. In the Second Question Presented, the petition contends that the respondent university violated petitioner's due process rights by failing to bestow upon him tenure status. Yet, the petition does not recognize that the Fourteenth Amendment is inapplicable to private entities, such as respondent. *See National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Significantly, the record is devoid of any evidence that respondent University is a public institution or that petitioner ever contested its private-entity status. Even the petition itself repeatedly refers to the respondent as a "private university." (Petition, at i, ii, 11). As a result, this portion of the Second Question Presented is explicitly foreclosed by this Court's decisions in *Tarkanian*, *Shelley*, and *Monroe*, *supra*. Thus, the petition should be denied. *See Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952).

In addition, the petition asserts that the New Jersey Superior Court, Law Division, the New Jersey Superior

---

denied for the reasons specified in paragraphs 5 and 6, *infra* pages 7-10.

Court, Appellate Division, and the New Jersey Supreme Court violated petitioner's due process rights by failing to review his Fourteenth Amendment issues. (Petition, at ii, 9-16). This argument is patently without merit. Both the Law Division and Appellate Division specifically found that respondent was a private university. Consequently, there was no reason for either court to conduct any further Fourteenth Amendment analysis because there was simply no state action. Such a determination is wholly consistent with this Court's precedent. *See, e.g., Tarkanian,* 488 U.S. at 191; *Shelley,* 334 U.S. at 13; *Monroe,* 365 U.S. at 172.

Moreover, contrary to petitioner's unsupported protestations, the New Jersey Supreme Court is not required to grant certification to review all decisions appealed from lower courts. *See* N.J. Ct. R. 2:12-4 (Gann 1996); *In re Route 280 Contract,* 89 N.J. 1, 1-2; 444 A.2d 51 (1982); *Terminal Construction Corp. v. Atlantic City Sewerage Authority,* 67 N.J. 403; 341 A.2d 327 (1975). Accordingly, review of this matter was discretionary and the New Jersey Supreme Court was entirely within its province to deny the petitioner's request for certification.

6. The Second Question Presented Raises An Issue That Was Not Raised In The Decision Or Record Below.

Respondent opposes the petition because the Second Question Presented contends that the state courts failed to uphold the petitioner's First Amendment protections. Specifically, the petition asserts that the state courts violated his First Amendment right to academic freedom by

not addressing his Fourteenth Amendment claims. (Petition at ii, 11-16). Contrary to the arguments in the petition, the state courts, as established in paragraph 5, *supra*, did in fact address plaintiff's Fourteenth Amendment claims. However, the state courts did not reach petitioner's federal due process claims in substance because they found respondent was a private university. Significantly, petitioner never offered any evidence into the record to dispute respondent's private status. Accordingly, the decisions by the state tribunals were wholly consistent with this Court's precedent. *See, e.g., Tarkanian,* 488 U.S. at 191; *Shelley,* 334 U.S. at 13; *Monroe,* 365 U.S. at 172.

Furthermore, the facts of the record demonstrate that petitioner never raised a First Amendment claim before the state courts. As noted above, the only federal issue put before the state tribunals was a fleeting claim of a Fourteenth Amendment violation. It is well-established that this Court does not have jurisdiction over any issue not presented and decided in the state court. *See Howlett,* 496 U.S. at 370 n. 16; *Cardinale,* 394 U.S. at 438; *Tacon,* 410 U.S. at 352. The record in this case, including petitioner's state-court complaint, is barren of any inference of an alleged First Amendment infringement. Significantly, the petition fails to identify in what instance below the First Amendment issue was raised for review, nor provides "pertinent quotations of specific portions of the record" to establish that the federal question was timely or properly raised as required by Supreme Court Rule 14(1)(g)(i). Sup. Ct. R. 14(1)(g)(i), 28 U.S.C. (West 1984 & Supp. 1996). As a result, the petition is fatally defective, and thus, in the context of this record, any resolution of this aspect by

the Second Question Presented would result in an impermissible advisory opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

FRANCIS A. MASTRO, Esq.
APRUZZESE, MCDERMOTT, MASTRO & MURPHY, P.C.
P.O. Box 112
25 Independence Boulevard
Liberty Corner, New Jersey 07938
(908) 580-1776
Counsel for Respondents